Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

The Wilson Corporation, *et al.*,
Petitioners,

v.

Tom Udall, Attorney General of New Mexico,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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August 26, 1996

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OPINIONS

OPINION

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COURT OF APPEALS
STATE OF NEW MEXICO
P.R. WALLACE, CLERK

Opinion Number _____

Filing Date: _____

Docket No. 16,484

THE WILSON CORPORATION, et al.,

Petitioners-Appellants,

vs.

STATE OF NEW MEXICO, ex rel.
TOM UDALL, Attorney General,

Respondent-Appellee.

TOM UDALL, Attorney General
of the State of New Mexico,

Petitioner-Appellee,

vs.

THE WILSON CORPORATION, et al.,

Respondents-Appellants,

and

BERRIDGE DISTRIBUTING CO., INC., et al.,

Intervenors/Cross-Petitioners-Appellants.

APPEAL FROM THE DISTRICT COURT
OF COLFAX COUNTY
PEGGY J. NELSON, District Judge

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The Wilson Corporation, et al.

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Assistant Attorney General
Albuquerque, NM

for Appellees
State of New Mexico

OPINION

HARTZ, Judge.

1. Pursuant to the New Mexico Antitrust Act, NMSA 1978, § 57-1-1 to -15 (Repl. Pamp. 1995), the Attorney General obtained approval from the Santa Fe County District Court for civil investigative demands (CIDs) directed to a number of companies for information regarding the pricing and marketing of gasoline in New Mexico. The requests for the CIDs were granted ex parte. See § 57-1-5(A). After service of the CIDs, some recipients raised challenges in various courts around the state. This is the second appeal to arise from those challenges.

2. The first appeal concerned a district court summary judgment quashing five of the CIDs. See Brewer Oil Co. v. State of New Mexico ex rel. Attorney General, ___ N.M. ___, 908 P.2d 799 (Ct. App. 1995), cert. denied, ___ N.M. ___, 907 P.2d 1009. The district court had ruled that the Attorney General had an improper purpose in seeking the CIDs. We reversed, holding that (1) the CIDs could be quashed only if the sole purpose of the Attorney General was an improper one and (2) the undisputed facts before the district court did not compel the inference that the sole purpose of the Attorney General was improper. Id. at ___, 908 P.2d at 801-03. In the course of the opinion we stated that the Attorney General could obtain enforcement of a CID without producing evidence of a violation of the Antitrust Act; all that was necessary was "that the Attorney General be conducting a

civil investigation to determine whether the Antitrust Act has been violated and that there be reasonable cause to believe that the recipient of the CID has information or materials relevant to the investigation." Id. at ___, 908 P.2d at 800.

3. This appeal involves a different district court and different companies. Proceedings from several judicial districts were consolidated in the Colfax County District Court. Some of the proceedings had been initiated by motions to quash filed by recipients of the CIDs (the Marketers). Others apparently had been initiated by petitions filed by the Attorney General seeking orders compelling compliance with CIDs.[1] See Section 57-1-5(B). After an evidentiary hearing the district court ordered the Marketers to comply with the CIDs. The Marketers raise the following contentions on appeal: (1) the Antitrust Act and the New Mexico Constitution require the Attorney General to establish reasonable cause that a violation of the Act has occurred or is occurring before a CID may be enforced; (2) on the record before the district

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[1] Eventually the Attorney General filed a petition to enforce against each Marketer. Therefore, we need not decide on this appeal whether recipients of CIDs may move to quash or whether the sole available procedure for judicial review is for the recipient to refuse to comply with the CID and then await initiation of an enforcement proceeding by the Attorney General. See Reisman v. Caplin, 375 U.S. 440 (1964) (taxpayer cannot obtain injunction or declaratory judgment against IRS summons).

court the Attorney General failed to establish the propriety of the CIDs and the Marketers demonstrated that the CIDs were issued for improper purposes; and (3) the district court improperly denied the Marketers an opportunity to obtain discovery from the Attorney General. We affirm.

I. REASONABLE CAUSE

4. The Marketers contend that a court can enforce a CID only if the Attorney General can show reasonable cause to believe that the Antitrust Act has been or is being violated. We disagree. Such a requirement would substantially thwart the purpose of CIDs. After all, the objects of our consideration are civil investigative demands. When the Attorney General is investigating whether the Antitrust Act has been violated, the answer to the inquiry is still unknown. If the Attorney General were reasonably satisfied that a violation had occurred or was occurring, he could bring a civil action under the Antitrust Act and obtain relevant records or other information through ordinary civil discovery. See §§ 57-1-7 (attorney general may bring an action for civil penalties), 57-1-8 (attorney general may seek injunctive relief); SCRA 1986, 1-011 (Repl. 1992) (pleading should not be filed without belief that there is good ground to support it). CIDs enable the Attorney General to obtain information without first accusing anyone of violating the Antitrust Act. This power is hardly unique to our Attorney General. The United States Supreme Court recognized almost 50 years ago that agencies "charged with seeing that the laws are enforced may . . . have and exercise powers of original inquiry." United States v. Morton Salt Co., 338 U.S. 632, 642 (1950) (FTC). Such power, which the Court

analogized to the grand jury's power of inquisition, enables the agency to "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." Id. at 642-43; see In re Gold Bond Stamp Co., 221 F. Supp. 391 (D. Minn. 1963) (power of United States Attorney General to obtain CIDs for antitrust investigation), aff'd, 325 F.2d 1018 (8th Cir. 1964).

5. In any event, the language of the statute is clear. The pertinent portion of Section 57-1-5(A) states:

> If the attorney general has reasonable cause to believe that a person has information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of Section 57-1-1 or 57-1-2 NMSA 1978, he may, before bringing any action, apply to the district court of Santa Fe county for approval of a civil investigative demand, demanding, in writing, such person to appear and be examined under oath, to answer written interrogatories under oath, or to produce the document or object for inspection and copying.

The statute is satisfied if the Attorney General is conducting a civil investigation to determine whether the Antitrust Act has been or is being violated, the information or items sought would be relevant to the investigation, and there is reasonable cause to believe that

the recipient of the CID possesses the information or item. This construction of Section 57-1-5 follows the unambiguous language of the statute and comports with the interpretation of similar statutes by other courts. See Brewer Oil, ___ N.M. at ___, 908 P.2d at 800 (citing federal cases). The Attorney General may have a great deal of evidence of antitrust violations when he seeks a CID. But he need not have such evidence, and he need not disclose what he has, to obtain enforcement of a CID.

6. Nor do constitutional restrictions on government searches and seizures impose a requirement that CIDs issue only upon a showing of reasonable cause to believe that the Antitrust Act has been or is being violated. The United States Supreme Court has long held that the Fourth Amendment to the United States Constitution does not require the government to show a likelihood of a violation of law before it can obtain compulsory process. Addressing the subpoena authority of the Administrator of the Wage and Hour Division of the United States Department of Labor under the Fair Labor Standards Act of 1938, the Court stated, "The gist of the protection [provided by the Fourth Amendment] is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 208 (1946). It then explained:

> Congress has made no requirements in terms of any showing of "probable cause"; and . . . any possible constitutional requirement of that sort was satisfied by the Administrator's showing in this case, including not only the allegations concerning

> coverage [under the Fair Labor Standards Act], but also that he was proceeding with his investigation in accordance with the mandate of Congress and that the records sought were relevant to that purpose. . . .
>
> [H]is investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grant jury's, or the court's in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be "limited by for[e]casts of the probable result of the investigation."

Id. at 215-16 (internal quotation marks, ellipses, and footnotes omitted; emphasis added); see Morton Salt, 338 U.S. at 651-54; see also United States v. Powell, 379 U.S. 48, 57 (1964) (probable cause not necessary for IRS summons); see generally 1 Kenneth C. Davis, Administrative Law Treatise § 4:1 (3d ed. 1994). The New Mexico Supreme Court summarized the law in In re Investigation No. 2 of the Governor's Organized Crime Prevention Commission, 91 N.M. 516, 517-18, 577 P.2d 414, 415-16 (1978). It stated that for the issuance of an administrative subpoena the United States Constitution ordinarily requires only that "(a) the inquiry must be within the authority of the agency; (b) the demand must not be too indefinite; and (c) the information must be

reasonably relevant to the purpose of the investigation." Id. at 517, 577 P.2d 415.

7. We are not persuaded that Article II, Section 10 of the New Mexico Constitution would require a "probability" showing that the federal Constitution does not. We are aware of no jurisdiction that imposes such a requirement on administrative subpoenas, summonses, or CIDs as a matter of state constitutional law. See Benson v. People, 703 P.2d 1274, 1278-79 (Colo. 1985) (en banc) (state constitutional standards are identical to federal standards); Ajello v. Hartford Fed. Sav. & Loan Ass'n, 347 A.2d 113, 118 (Conn. Super. Ct. 1975) (same); State ex rel. Shriver v. Leech, 612 S.W.2d 454, 458-59 (Tenn.) (same), cert. denied, 454 U.S. 836 (1981).

8. The Marketers' argument under Article II, Section 10 rests primarily on decisions requiring warrants based on probable cause to conduct administrative searches, specifically Dunlop v. Hertzler Enterprises, 418 F. Supp. 627 (D.N.M. 1976) (warrantless OSHA search), and State ex rel. Environmental Improvement Agency v. Albuquerque Publishing Co., 91 N.M. 125, 571 P.2d 117 (1977) (warrantless search), cert. denied, 435 U.S. 956 (1978). Those decisions, which, incidentally, apply only the federal Constitution, are inapposite. The intrusion resulting from compulsory process is readily distinguishable from the intrusion resulting from a nonconsensual search. As the United States Supreme Court wrote in upholding a Department of Labor subpoena:

> The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside. No officer or other person has sought to enter [the subpoenaed parties'] premises against their will, to search them, or to seize or examine their books, records or papers without their assets, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections . . . .

Oklahoma Press, 327 U.S. at 195. The Supreme Court reaffirmed the distinction between compulsory process and nonconsensual entries in Donovan v. Lone Steer, Inc., 464 U.S. 408, 414-15 (1984).

9. Moreover, probable cause does not have the same meaning in the context of administrative searches that it has in the context of searches for evidence of crime. See Camara v. Municipal Court, 387 U.S. 523, 537-39 (1967). Probable cause for an administrative search exists "[i]f a valid public interest justifies the intrusion contemplated." Id. at 539. For example, an area warrant to check for violations of health and safety codes for housing may be justified by the lack of any inspection for a significant period of time. See id. at 538. It thus appears that some administrative warrants may issue

simply because of a reasonable need to be assured that the law is not being violated. If anything, the administrative-search decisions argue against, not for, a requirement that a CID be enforced only upon a showing of probability that the Antitrust Act has been or is being violated.

10. The Marketers also rely on In re Investigation No. 2. That decision followed Morton Salt in establishing the requisites for a subpoena obtained by the Governor's Organized Crime Prevention Commission. But our Supreme Court prefaced its reference to Morton Salt by noting: "The Commission is an investigatory rather than an accusatory body and therefore its subpoenas are administrative subpoenas. Dixon v. Pennsylvania Crime Commission, 347 F. Supp. 138 (M.D. Pa. 1972); Illinois Crime Investigating Comm'n v. Buccieri, . . . 224 N.D.2d 236 (1967)." 91 N.M. at 517, 577 P.2d at 415. The Marketers argue that the Attorney General has an accusatory function, so his CIDs are not administrative subpoenas governed by Morton Salt. We disagree. That Marketers misconstrue In re Investigation No. 2. Our Supreme Court's reference to the accusatory-investigatory dichotomy can be understood by reviewing the cases cited at the end of the above-quoted sentence. In particular, Dixon, 347 F. Supp. at 141-42, clarifies that what the Court meant by an accusatory body was an agency whose function is "to find named individuals guilty of violating the criminal laws . . . and to brand them as criminals in public," as was alleged in Jenkins v. McKeithen, 395 U.S. 411, 428 (1969). The Attorney General has no such role. He does not make findings that anyone has violated the antitrust laws. He only brings actions for the courts to

decide. Moreover, Jenkins said nothing about requiring probable cause for subpoenas from an accusatory body.

11. In short, we find no support for a constitutional requirement that a CID can issue only if the Attorney General establishes a likelihood that the Antitrust Act has been or is being violated. We do not, however, minimize the power thereby granted to the Attorney General. Even reasonable CIDs can impose a heavy burden on the recipient. A CID may require disclosure of information that the recipient wishes, for perfectly appropriate reasons, to keep confidential. Collecting information and responding to inquiries can be expensive, time-consuming, and distasteful. The Attorney General's authority to obtain CIDs should not be exercised on a whim, but only for sound reasons, although it must be recognized that on occasion the public interest is served when the Attorney General's purpose is to be assured that there has been no violation of the law. See Morton Salt, 338 U.S. at 642-43. If Attorney Generals wield the CID authority imprudently, the legislature can impose a reasonable-cause requirement. See People ex rel. Babbitt v. Herndon, 581 P.2d 688 (Ariz. 1978) (en banc) (statute requires reasonable cause to believe Act has been violated). Or it can even revoke the authority altogether. That decision is for the legislature, not this Court. All we hold today is that the authority granted by Section 57-1-5 is not unconstitutional.

II. DOES RECORD SUSTAIN DISTRICT COURT'S UPHOLDING VALIDITY OF CIDs?

12. The Marketers contend that the district court should not have enforced the CIDs because (1) the Attorney General failed to present any evidence to support them and (2) the Marketers demonstrated that the CIDs were issued for improper purposes. To resolve these contentions, we must first address the nature of the proceeding in district court.

13. A proceeding to enforce or quash compulsory process--whether denominated a subpoena, a summons, or a CID--on behalf of an administrative agency is not a trial. Such proceedings are summary in nature. See In re Office of Inspector Gen., 933 F.2d 276, 277 (5th Cir. 1991); United States v. Kis, 658 F.2d 526, 535 (7th Cir. 1981) ("[W]e cannot stress too emphatically that these proceedings [regarding an IRS summons] are intended to be summary in nature."), cert. denied, 455 U.S. 1018 (1982); Stuart v. United States, 813 F.2d 243, 250 (9th Cir. 1987), rev'd on other grounds, 489 U.S. 353 (1989).

14. One reason to handle such matters summarily is that the issues to be determined lend themselves to summary disposition. The court does not need to resolve whether the investigation being conducted by the agency will bear fruit. Ordinarily it need decide only such matters as whether the investigation is within the authority of the agency, whether the information sought is relevant to the investigation, and whether the demand is sufficiently precise. See In re Investigation No. 2, 91 N.M. at 517, 577 P.2d at 415. Discovery disputes in civil litigation

raise similar questions and are customarily resolved satisfactorily in summary proceedings.

15. A second reason for summary proceedings is that an investigation can readily be thwarted and limitation periods may expire if prolonged litigation accompanies every attempt to obtain information. Courts must be vigilant in protecting the rights of those who object to providing information to an investigating agency, but delaying tactics cannot be countenances. See United States v. Witmer, 835 F. Supp. 208, 213 (M.D. Pa. 1993), aff'd, 30 F.3d 1489 (3d Cir. 1994).

16. To best accommodate the competing interests of the Attorney General and persons opposing his authority, we adopt a procedure that has been followed in other jurisdictions. Before a court will enforce a CID, the Attorney General must make a sworn showing of the basic elements required for compulsory process. See United States v. Stuart, 489 U.S. 353, 360 (1989); United States v. Davis, 636 F.2d 1028, 1034 (5th Cir.), cert. denied, 454 U.S. 862 (1981); Kis, 658 F.2d at 536;; Babbitt, 581 P.2d at 690; Benson, 703 P.2d at 1279-80; Kohn v. State ex rel. Humphrey, 336 N.W.2d 292, 295-96 (Minn. 1983). The affidavit (or testimony) would need to establish the following: (1) the Attorney General is conducting an investigation to determine whether the Antitrust Act has been or is being violated; (2) the information sought is relevant to the investigation; and (3) there is reasonable cause to believe that the recipient of the CID possesses the information. If the Attorney General makes the necessary showing, the person challenging the CID bears the burden of establishing some

impropriety in the CID, such as the absence of a proper purpose for the CID, the privileged nature of the information sought, or the unreasonable burden imposed by the CID. See Powell, 379 U.S. at 58; United States v. Beason Fed. Sav. & Loan, 718 F.2d 49, 52 (2d Cir. 1983); Davis, 636 F.2d at 1034; In re Newton, 718 F.2d 1015, 1019 (11th Cir. 1983), cert. denied, 466 U.S. 904 (1984). The challenge should be supported by a sworn showing.

17. Although the Antitrust Act requires a hearing on the Attorney General's petition to enforce a CID, § 57-1-5(B), the scope of the hearing will depend on the nature of the challenge and the strength of the showing. On this appeal we need not, and probably could not, set forth how to conduct the hearing in every possible circumstance. That decision must be left in the first instance to the sound discretion of the trial judge, just as we leave to the sound discretion of the trial judge the procedure to be followed to resolve discovery disputes in civil litigation. See Tarkett, Inc. v. Congoleum Corp., 144 F.R.D. 282, 284-85 (E.D. Pa. 1992); 4A James W. Moore, Moore's Federal Practice ¶ 37.02[7] (2d ed. 1995). We recognize that Brewer stated that those challenging the CIDs in that case were "not foreclosed from seeking a determination on this issue on the merits, after a full evidentiary hearing." Brewer, ___ N.M. at ___, 908 P.2d at 803. But the point we were attempting to make in that opinion was only that our reversal of the summary judgment quashing the CIDs did not prevent the challengers from ultimately prevailing on the merits. We did not intend to suggest that a challenge to a CID must always be resolved by a "full evidentiary hearing." That issue had not been addressed

in the briefs and was not a matter considered by this Court.

18. Turning to the particulars of the case before us, we find no error. Although the petitions for issuance of the CIDs were unsworn, the record contains affidavits by the Attorney General with respect to each of the Marketers. Each affidavit states that his office is investigating possible violations of the Antitrust Act within the gasoline industry and describes the nature of the investigation. The affidavits also assert, although somewhat obliquely, that each of the Marketers markets gasoline. These affidavits satisfy the requirement of a sworn showing of the basic elements required for enforcement of the CIDs. From the affidavits' description of the investigation, the district court could determine whether the information sought was relevant to the investigation and whether it would be reasonable to believe that a gasoline marketer would possess the information.

19. On this appeal the Marketers do not argue that the information sought by the CIDs would be irrelevant to the investigation described in the Attorney General's affidavits. Nor do they contend that it would be unreasonable to believe that a gasoline marketer would possess the information sought. Rather, they contend that the district court erred in denying their motion for judgment at the close of the Attorney General's case because he had totally failed to put on any evidence of compliance with the requirements of Section 57-1-5(B), or even to establish the existence of the individual CIDs. The Marketers' argument appears to assume that the district court hearing was required to be of the nature of

a trial, so that any determination by the court must be supported by evidence admitted at the hearing.

20 The Marketers' argument suffers from three shortcomings. First, even if the Attorney General had failed to make a prima facie showing by the close of his case, the Marketers waived their challenge to the sufficiency of the Attorney General's evidence by proceeding to put on evidence themselves. See In re Strozzi, 120 N.M. 541, 544, 903 P.2d 852, 855 (Ct. App.), cert. denied, 120 N.M. 498, 903 P.2d 240 (1995). That is, the issue on appeal is the sufficiency of all the evidence, not just the evidence submitted before the Marketers' motion.

21. Second, even if the proceeding were a trial, a party at trial has no obligation to prove matters conceded by the opposing party in its pleadings. See Panzer v. Panzer, 87 N.M. 29, 33, 528 P.2d 888, 892 (1974). Because of the admissions in the Marketers' responses to the Attorney General's petitions for enforcement, the Attorney General was not required to put on evidence that CIDs had been issued and served upon the Marketers.

22. Third, as previously discussed, the proceeding was not a trial. The district court could appropriately consider affidavits submitted by the parties and then determine whether further evidentiary proceedings were necessary. For example, each of the Marketers submitted affidavits stating that they make pricing decisions concerning motor fuels. These affidavits eliminated any issue regarding the reasonable probability that the Marketers possessed pricing information sought by the CIDs. Also, the Attorney

General's affidavits sufficed to establish the prima facie validity of the CIDs. Although the affidavits were submitted after the evidentiary hearing, the district court accepted and considered them. On appeal the Marketers have not challenged their untimeliness. In our view, it is within the district court's discretion to accept the affidavits after the hearing, at least so long as the Marketers were not precluded from responding to them if they desired. Cf. Stuart, 813 F.2d at 250 (IRS can amend affidavit on remand). It appears from the record that the Marketers did not seek to respond to the affidavits.

23. Because the pleadings and affidavits established the prima facie validity of the CIDs, the issue before the district court became whether the Marketers had borne their burden of showing the invalidity of the CIDs in some respect. On appeal the Marketers contend that the respect in which the CIDs were invalid is that the Attorney General's purposes for seeking the CIDs were improper. They argue that the Attorney General sought the information from Marketers to advance his legislative agenda and his political career. As we stated in Brewer, however, CIDs should not be invalidated on this ground unless the alleged improper purposes were the Attorney General's only purposes. If one of the purposes of the CIDs was to obtain information for an investigation of violations of the Antitrust Act, then we must uphold the district court's order enforcing the CIDs. Courts can issue protective orders to prohibit improper use of information acquired by CIDs. See Brewer, ___ N.M. at ___, 908 P.2d at 801.

24. In this case the district court conducted an evidentiary hearing. It was not persuaded by the Marketers' evidence that the Attorney General had an improper purpose. On the contrary, the district court found: "The evidence shows that the Attorney General is investigating gasoline marketing to determine if there are any violations of the Antitrust Act." The Marketers had the burden of persuasion on this issue. The finding implies that the Marketers failed to meet their burden. We need not determine whether there was sufficient evidence to support the district court's finding that the Attorney General had a proper purpose. To affirm, it suffices if it was rational for the district court to be unpersuaded by the Marketers' evidence that the Attorney General was motivated solely by an improper purpose. See Lopez v. Adams, 116 N.M. 757, 578, 867 P.2d 427, 428 (Ct. App. 1993) ("If a finding is made against the party with the burden of proof, we [must] affirm if it was rational for the trial court to disbelieve the evidence offered by that party."), cert. denied, 116 N.M. 801, 867 P.2d 1183 (1994). Without detailing the evidence at the hearing, we hold that the evidence presented by the Marketers was not so compelling that every rational person would necessarily have determined that the only purposes of the Attorney General were improper ones. We therefore reject the Marketers challenge on appeal.

III. DISCOVERY

25. Finally, the Marketers contend that the district court erred by denying them the opportunity to conduct further discovery. Of course, if they were improperly denied discovery which could have assisted them in meeting their

burden at the district court evidentiary hearing, we would reverse to enable the Marketers to conduct discovery and then present further evidence to the district court.

26. The Marketers, however, must meet a heavy burden to be entitled to discovery in an enforcement proceeding.

> [E]nforcement actions are intended to be summary and are designed to secure quick judicial review of administrative activities. Consistent therewith, discovery is allowed in only the exceptional cases "where the circumstances indicate that further information is necessary for the courts to discharge their duty." SEC v. Dresser Indus., 628 F.2d 1368, 1388 (D.C. Cir.) (en banc) (citations omitted), cert. denied, 449 U.S. 993 . . . (1980).
>
> As a general rule, "a defendant is not 'entitled to engage in counter-discovery to find grounds for resisting' a subpoena. . . ." In re EEOC, 709 F.2d [392,] 400 [(5th Cir. 1983)] (citations omitted). A limited amount of discovery may be allowed if, for example, "the defendant 'makes a preliminary and substantial demonstration of abuse,' that is, where the defendant has presented 'meaningful evidence' that the agency is attempting to abuse its investigative authority. Anything short of this showing is not enough. . . ." Id. (citations omitted). In considering the issue

> of the scope and range of discovery in enforcement actions, courts "'must be cautions in granting . . . discovery rights, lest they transform subpoena enforcement proceedings into exhaustive inquisitions into the practices of the regulatory agencies.'" United States v. Aero Mayflower Transit Co., 831 F.2d 1142, 1147 (D.C. Cir. 1987) (quoting Dresser, 628 F.2d at 1388).

In re Office of Inspector Gen., 933 F.2d at 277-78. Also, we agree with the federal appellate courts that "exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted." Id. at 278.

27. The Marketers argue that the district court erred in its finding that they had "not made a preliminary and substantial demonstration of abuse and improper motive, and therefore discovery to aid in these defenses in compliance with the CIDs will not be allowed." Yet, the Marketers' briefs on appeal do not set forth what discovery they sought or how such discovery would be relevant to the issues on appeal. We will not search the record below to determine whether there is a basis for their challenge to the district court's ruling. See In re Estate of Heeter, 113 N.M. 691, 694, 831 P.2d 990, 993 (Ct. App.), cert. denied, 113 N.M. 690, 831 P.2d 989 (1992). We therefore reject the Marketers' contentions regarding the denial of discovery.

IV. CONCLUSION

28. We affirm the district court order enforcing the CIDs against the Marketers.

29. **IT IS SO ORDERED.**

/s/
HARRIS L. HARTZ, Judge

WE CONCUR:

/s/
RUDY S. APODACA, Chief Judge

/s/
MICHAEL D. BUSTAMANTE, Judge

ORDERS

EIGHT JUDICIAL DISTRICT COURT
COUNTY OF COLFAX
STATE OF NEW MEXICO

THE WILSON CORPORATION, Petitioner, v. STATE OF NEW MEXICO, *ex rel* TOM UDALL, ATTORNEY GENERAL, Respondent.	Civil Action No. 94-64 CV Socorro County No. CV 94-84 consolidated with No. 94-66(SQ)
TOM UDALL, ATTORNEY GENERAL, OF THE STATE OF NEW MEXICO, Petitioner, v. THE WILSON CORPORATION, *et al.* Respondent.	Civil No 94-66(SQ) No. 94-72CV Taos County Nos. 94-186 CV 94-187 CV San Juan County Nos. 94-593(SQ) 94-597(SQ) 94-598(SQ) McKinley County Nos. 94-1(SQ)

BERRIDGE DISTRIBUTING CO., INC., *et al.*,	)	94-2(SQ)
	)	Santa Fe County
	)	No. 94-147(SQ)
Intervenors and Cross-Petitioners,	)	
	)	

FILED IN OFFICE OF CLERK
OF DISTRICT COURT OF
COLFAX COUNTY NEW MEXICO
AT 10:40 O'CLOCK A.M.
ON MAR 15, 1995

ORDER DISMISSING PETITIONS FOR DECLARATORY JUDGMENT

THIS MATTER having come before the Court upon Motions by the State of New Mexico *ex rel.* Tom Udall, Attorney General ("State") to dismiss Petitions for Declaratory Judgment filed in the above-consolidated proceedings by The Wilson Corporation, Berridge Distributing Company, Polk Oil Company, Metzger Stores, Inc., Robinson Oil Company, Ross Oil Company, Colomex Oil & Gas Company and Latasa Oil Company (collectively "Distributors"), and the Court having considered the arguments by the parties relating thereto and being otherwise fully advised in the premises;

THE COURT FINDS that the legal issues raised by the Distributors in their declaratory judgment actions are identical to those raised in defense of the State's actions to enforce the Civil Investigative Demands ("CIDs") which are the subject of these consolidated proceedings.

Accordingly, the Distributors have a full and adequate legal remedy in the defense of the State's actions to enforce those CIDs and their petitions for declaratory relief should be dismissed. *Reisman v. Caplin*, 375 U.S. 440 (1964); *In re Office of Inspector General*, 933 F.2d 276 (5th Cir. 1991).

THE COURT THEREFORE ORDERS that the Petitions for Declaratory Judgment filed by The Wilson Corporation, Berridge Distributing Company, Polk Oil Company, Metzger Stores, Inc., Robinson Oil Company, Ross Oil Company, Colomex Oil & Gas Company and Latasa Oil Company be and hereby are dismissed with prejudice.

ORDERED this 15th day of March, 1995.

/s/ Peggy J. Nelson
DISTRICT JUDGE

Approved As to Form:

_____

E. Edwin Hallman, Jr., Esquire
David C. Moss, Esquire
Attorneys for The Wilson Corporation, Colomex Oil & Gas Company, Robinson Oil Company, Ross Oil Company, Berridge Distributing Company, Polk Oil Company, Metzger Stores, Inc., Dial Oil Company, Farmington Oil Company, Graves Oil & Butane, Inc.,

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Attorney for Dial Oil Company, Eagle Energy, Inc., Farmington Oil Company, Graves Oil & Butane, Inc., Indian Capitol Distributing Co., Inc.

Norman McDonald, Esquire
Attorney for Latasa Oil Company

/s/
Susan G. White
Assistant Attorney General
Attorney for the State of New Mexico

EIGHT JUDICIAL DISTRICT COURT
COUNTY OF COLFAX
STATE OF NEW MEXICO

THE WILSON CORPORATION, Petitioner, v. STATE OF NEW MEXICO, *ex rel* TOM UDALL, ATTORNEY GENERAL, Respondent.	) Civil Action No. 94-64 CV consolidated with No. 94-66(SQ)
TOM UDALL, ATTORNEY GENERAL, OF THE STATE OF NEW MEXICO, Petitioner, v. THE WILSON CORPORATION, *et al.* Respondent.	) Civil No. 94-66(SQ)

BERRIDGE DISTRIBUTING CO., INC., *et al.*,	No. 94-186 CV No. 94-187 CV No. 94-72 CV
Intervenors and Cross-Petitioners,	
STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL,	
Petitioner,	
v.	San Juan County Civil Action No. 94-593(SQ)
DIAL OIL COMPANY,	
Respondent	
STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL,	
Petitioner,	
v.	San Juan County Civil Action No. 94-597(SQ)
FARMINGTON OIL COMPANY,	
Respondent	

STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL, Petitioner, v. GRAVES OIL & BUTANE CO., INC., Respondent	)	San Juan County Civil Action No. 94-598(SQ)
STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL, Petitioner, v. EAGLE ENERGY, INC., Respondent	)	McKinley County Civil Action No. 94-1(SQ)

STATE OF NEW MEXICO *ex rel.* TOM UDALL, ATTORNEY GENERAL, Petitioner, v. INDIAN CAPITOL DISTRIBUTING CO., Respondent	)	McKinley County Civil Action No. 94-2(SQ)
IN RE REQUEST FOR APPROVAL OF CIVIL INVESTIGATIVE DEMAND	)	Santa Fe County Civil No. SF 94-147(SQ)
LATASA OIL COMPANY, INC., Petitioner, v. STATE OF NEW MEXICO, *ex rel* TOM UDALL, ATTORNEY GENERAL, Respondent.	)	Socorro County Civil Action No. CV 94-84

FILED IN OFFICE OF CLERK
OF DISTRICT COURT OF
COLFAX COUNTY, NEW MEXICO
AT 3:41 O'CLOCK P.M.
ON FEB 23, 1995

DECISION AND ORDER

This matter came before the Court for hearing on November 16, 1994. The Wilson Corporation, Berridge Distributing Company, Metzger Stores, Inc., Polk Oil Company, Colomex Oil & Gas Company, Ross Oil Company and Robinson Oil Company (collectively "Distributors"), Petitioners, Cross-Respondents and Intervenors herein, were represented by F. Edwin Hallman, Jr., David C. Moss, Robin C. Blair and Randolph B. Felker. The State of New Mexico, *ex rel.* Tom Udall, Attorney General, Petitioner, Respondent and Cross-Petitioner herein, was represented by Susan G. White and Eugene I. Zamora, Assistant Attorney Generals.

The State was required to show that the Civil Investigative Demands ("CID") were proper in form, that the State has reasonable grounds to believe that the Distributors have information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of the Antitrust Act and that the CIDs otherwise complied with the requirements of § 57-1-5 of the New Mexico Antitrust Act, NMSA 1978, as amended. The Distributors were permitted to defend and to present evidence and testimony

to support their claims that the CIDs were burdensome and oppressive, were not in proper form, were unconstitutional and were issued by the Attorney General with improper motives.

The Distributors subpoenaed the Attorney General's Communications Director, Kay Roybal, and one of the Attorney General's consultants, Sam Rodar, to testify at the hearing. Both Ms. Roybal and Mr. Rodar appeared, were examined and by agreement of counsel for Distributors thereafter excused. The Distributors also subpoenaed Attorney General Tom Udall, who did not appear. Following testimony by Ms. Roybal and Mr. Rodar, counsel for the Distributors indicated that the Distributors no longer needed Mr. Udall's testimony and withdrew Mr. Udall's subpoena.

Upon the State's unopposed motion, the following cases, each of which involves virtually identical issues of fact and law, were consolidated under Civil Action File No. 94-66(SQ) for all purposes by Order of December 30, 1994: *State of New Mexico v. Dial Oil Co.*, San Juan County Civil Action No. 94-593(SQ); *State of New Mexico v. Farmington Oil Company,* San Juan County, Civil Action No. 94-597 (SQ); *State of New Mexico v. Graves Oil & Butane Co.*, San Juan County, Civil Action No. 94-598 (SQ); *State of New Mexico v. Eagle Energy, Inc.*, McKinley County, Civil Action No. 94-1 (SQ); *State of New Mexico v. Indian Capitol Distributing Co.*, McKinley County, Civil Action No. 94-2 (SQ); *In re Request for Approval of Civil Investigative Demand*, Santa Fe County, Civil Action No. SF 94-147 (SQ); *Latasa Oil*

Company, Inc. v. *State of New Mexico*, Socorro County, Civil Action No. CV 94-84.

Based on the foregoing, the Court finds as follows:

1. The Court has jurisdiction over the parties and subject matter of these consolidated proceedings.

2. On May 31, 1994, the Attorney General applied to the First Judicial District Court, Santa Fe County pursuant to Section 57-1-5(A) of the New Mexico Antitrust Act for Civil Investigative Demands ("CIDs") to the Wilson Corporation, Colomex Oil & Gas Company, Robinson Oil Company, Metzger Stores, Inc., Eagle Energy, Inc., Farmington Oil Company, Graves Oil & Butane Company, Latasa Oil Company, and Indian Capitol Distributing Company. The First Judicial District Court approved and issued the CIDs on May 31, 1994.

3. On June 6, 1994, the Attorney General applied to the First Judicial District Court, Santa Fe County for CIDs to Berridge Distributing Company, Polk Oil Company, Dial Oil Company, Honstein Oil Company and Ross Oil Company. The First Judicial District Court approved and issued these CIDs on June 7, 1994.

4. The CIDs were served on each of the Distributors in conformance with Rule 1-004 of the New Mexico Rules of Civil Procedure, as required by Section 57-1-5(A) of the New Mexico Antitrust Act NMSA 1978 (1987 Repl.)("the Act").

5. The CIDs described the nature of the conduct under investigation by the State as sharp disparities in the price of gasoline from community to community and uniform price increases in certain communities, which together with other information suggests that competition may be limited to one or more levels of the gasoline industry.

6. The description of the nature of the conduct under investigation contained in the CIDs, while general, satisfies the requirements of Section 57-1-5(A) of the Act. The State need not describe with specificity the precise nature of the conduct under investigation, but a description of the general nature of the conduct is sufficient. To insist upon specificity at an early stage of investigation would defeat the purpose of the demand. *See Petition of Gold Bond Stamp Co.*, 221 F. Supp. 391 (D.Minn. 1963), *aff'd*, 325 F.2d 1018 (8th Cir. 1964); *Benson v. People*, 703 P.2d 1274 (Colo.1985).

7. The CIDs described the class or classes of documents or objects sought with sufficient definiteness to permit them to be fairly identified.

8. The written interrogatories were part of the CID.

9. The 30-day return date set in the CIDs was reasonable, particularly in light of the fact that the State made clear that it was flexible with respect to the return date and was willing to accommodate particular problems in responding.

10. A copy of Section 57-1-5 of the Act was appended to the CIDs, as required by Section 57-1-5(A).

11. The CIDs state that the Attorney General believes that some gasoline marketers in New Mexico may be violating § 57-1-1 *et seq.* of the New Mexico Antitrust Act and § 57-14-3 of the New Mexico Price Discrimination Act. Price discrimination may violate the Antitrust Act. Therefore even if this reference to the Price Discrimination Act is improvident since the Price Discrimination Act contains no CID provisions, it does not affect the validity of the CID.

12. No demand to produce a document or object for inspection and copying shall contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued in a civil proceeding by a district court of this state.

13. The burden of demonstrating that a CID is unreasonably burdensome or otherwise improper as measured against the standards applicable to a subpoena duces tecum is upon the person contesting the CID.

14. The Distributors claimed generally that the CIDs are burdensome and oppressive. While it will undoubtedly take a considerable amount of time to compile the information sought by the State, the Distributors presented no evidence as to the form in which the information is currently held, whether computerized or not, the process by which it would have to be compiled, the realistic number of hours compilation would demand,

the cost to each company in complying, how compliance could be made easier, or other specific evidence supporting their claim or burdensomeness.

15. Based upon the CIDs themselves and the presentations of the parties, I find that these CID are not unreasonably burdensome and/or oppressive.

16. The Distributors argued that the Attorney General should pay, in advance, the cost of compliance with the CIDs.

17. The paragraph in Section 57-1-5 (A) of the Act which prohibits any request for documents from containing demands which would be unreasonable or improper if contained in a subpoena duces tecum issued in a civil proceeding by a district court of this state provides a guideline as to the permissible scope of the CID. That paragraph does not incorporate within the Act the totality of SCRA 1-045, including the payment of costs by the State.

18. The Distributors' request for costs is denied.

19. The Distributors claim that the Attorney General sought the CIDs for improper purposes. They argue that the CIDs were sought in aid of the Attorney General's campaign for re-election; that they were sought with the purpose of advising the New Mexico State Legislature; and that the Office of the Attorney General is being uses by Sam Rodar to pursue his own personal agenda.

20. It is a fact of our electoral system that the Attorney General must run for office every four years. Tom Udall's investigation of gasoline marketing and other possible violations of the Antitrust Act may endear him to the general public. But the public's endorsement of his efforts, through re-election, do not without substantially more indicate an improper motive.

21. Distributors have not shown that the CIDs were obtained for the purpose of pursuing legislation aimed at curbing gas prices. The evidence shows that the Attorney General is investigating gasoline marketing to determine if there are any violations of the Antitrust Act.

22. Attorney General, although a part of the Executive Branch of government, often serves as advisor to the Legislature, or to individual legislators, upon request. This is entirely proper. It would be a great and unwarranted waste of state resources if after a thorough investigation the Attorney General were not in a position to share non-confidential information with the Legislature.

23. The Distributors introduced no credible evidence in support of their claim that Mr. Rodar has persuaded the Attorney General to use his office to advance Mr. Rodar's personal agenda or that Mr. Rodar has in some manner orchestrated the Attorney General's investigation. Mr. Rodar testified to the limited role he has played in working for the Attorney General, and the circumscribed scope of work in his contract with the Attorney General verifies his limited role in the investigation.

24. I find that the Distributors have not made a preliminary and substantial demonstration of abuse and improper motive, and therefore discovery to aid in these defenses to compliance with the CIDs will not be allowed.

25. The evidentiary privilege against self incrimination does not apply to , or extend to, corporations or individuals in their representative capacity. *Doe v. State*, 114 N.M. 78 (1992). There is no constitutional support for Distributors' argument that they should not be required to comply with the CIDs on the grounds that the responses thereto may tend to incriminate the corporations.

26. The Distributors' argument that the CID process in this case was constitutionally deficient because the State did not show probable cause that a violation of the Antitrust Act has occurred is not persuasive. The cases are legion which hold that the Fourth Amendment right to be free from unreasonable searches and seizures is not implicated in the civil investigative demand process. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Petition of Gold Bond Stamp Co.*, 221 F. Supp.1 391, *aff'd*, 325 F.2d 1018 (8th Cir. 1964); *Benson v. People*, 703 P.2d 1274 (Colo. 1985).

27. The process for obtaining and enforcing a CID prescribed by Section 57-1-5 of the New Mexico Antitrust Act includes judicial review of the Attorney General's application for the CID. In determining whether a CID satisfies constitutional requirements, the court must determine (a) that the investigation is for a lawfully

authorized purpose; (b) that the information sought is relevant to the inquiry; and (c) that the CID is sufficiently specific to obtain documents which are adequate but not excessive for the inquiry. A CID is reasonable without probable cause if it satisfies those criteria.

28. Although Art. II, Sec. 10 of the New Mexico Constitution may provide broader protection than does the Federal Constitution in some respects, Section 57-1-5 of the New Mexico Antitrust Act and the process followed by the Attorney General in obtaining CIDs in this case conforms with the requirements of the New Mexico Constitution.

29. The Attorney General is required by Section 57-1-5(C) of the Antitrust Act to keep confidential any material produced pursuant to the Act, prior to filing an action for violations under investigation. To the extend the Distributors believe they need additional protection for information provided in response to the CIDs they may pursue a motion for a protective order. However, such motions and any required motions hearing should not delay compliance with the CIDs in the interim.

30. In summation, I find that the CIDs are proper in form and that there is reasonable cause to believe that each of the Distributors has information or may be in possession, custody or control of documents or other tangible objects relevant to a civil investigation for violations of the Antitrust Act.

THEREFORE, THE COURT ORDERS as follows:

1. The State's Motions for Protective Order with respect to the Distributors' Interrogatories and Requests for Production of Documents are granted;

2. The State's Motion to Quash Subpoena Duces Tecum with respect to Sam Rodar is granted;

3. The Distributors' Motions for Summary Judgment or in the Alternative to Quash Civil Investigative Demands are denied;

4, The State's Petitions for Order requiring each of the Distributors to comply with Civil Investigative Demands are granted;

5. The Wilson Corporation, Berridge Distributing Company, Metzger Stores, Inc., Polk Oil Company, Ross Oil Company, Robinson Oil Company, Colomex Oil & Gas Company, Eagle Energy, Inc., Dial Oil Company, Farmington Oil Company, Graves Oil & Butane Company, Indian Capitol Distributing Company, Honstein Oil Company, and Latasa Oil Company shall each of them comply fully and under oath within 30 days of entry of this Order with the Civil Investigative Demands issued variously by the First Judicial District Court, Santa Fe County, on May 31, 1994 and June 7, 1994; and

6. The Court will retain jurisdiction of these cases for the purpose of resolving any disputed that may arise in the course of compliance with these CIDs.

ORDERED this 23rd day of February, 1995.

/s/ Peggy L. Nelson
District Judge

Approved As to Form:

_____

E. Edwin Hallman, Jr., Esquire
David C. Moss, Esquire
Attorneys for The wilson Corporation, Colomex Oil & Gas Company, Robinson Oil Company, Ross Oil Company, Berridge Distributing Company, Polk Oil Company, Metzger Stores, Inc., Dial Oil Company, Farmington Oil Company, Graves Oil & Butane, Inc., Eagle Energy, Inc., Indian Capitol Distributing Co., Inc., Honstein Oil Company, and Latasa Oil Company

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Robin C. Blair, Esquire
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Thomas J. Hynes, Esquire
Attorney for Dial Oil Company, Eagle Energy, Inc., Farmington Oil Company, Graves Oil & Butane, Inc., Indian Capitol Distributing Co., Inc.

Norman McDonald, Esquire
Attorney for Latasa Oil Company

/s/

Susan G. White
Assistant Attorney General
Attorney for the State of New Mexico

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
Thursday, May 2, 1996

NO. 23,583

THE WILSON CORPORATION, et al.,

Petitioners-Petitioners,

vs.

STATE OF NEW MEXICO, ex rel.,
TOM UDALL, ATTORNEY GENERAL,

Respondent-Respondent,.

TOM UDALL, Attorney General
of the State of New Mexico,

Petitioner-Respondent,

vs.

THE WILSON CORPORATION, et al.,

Respondents-Petitioners,

and

BERRIDGE DISTRIBUTING CO., INC.,

Intervenors-Petitioners.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied** in Court of Appeals numbers 16484.

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT

By /s/ Jane Gurulé
Chief Deputy

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

EIGHT JUDICIAL DISTRICT COURT
COUNTY OF COLFAX
STATE OF NEW MEXICO

THE WILSON CORPORATION, Petitioner, v. STATE OF NEW MEXICO, *ex rel* TOM UDALL, ATTORNEY GENERAL, Respondent.	) Civil Action No. 94-64 CV) Socorro County) No. CV 94-84 consolidated with No. 94-66(SQ)
TOM UDALL, ATTORNEY GENERAL, OF THE STATE OF NEW MEXICO, Petitioner, v. THE WILSON CORPORATION, *et al.* Respondent.	) Civil No. 94-66(SQ)) No. 94-72 CV) Taos County) Nos. 94-186 CV 94-187 CV) San Juan County) Nos. 94-593(SQ) 94-597(SQ) 94-597(SQ)) Mc.Kinley County

BERRIDGE DISTRIBUTING CO., INC., *et al.*,	)	Nos. 94-1 (SQ) 94-2(SQ)
	)	Santa Fe County
Intervenors and Cross-Petitioners,	)	No. 94-147 (SQ)

FILED IN OFFICE OF CLERK
OF DISTRICT COURT OF
COLFAX COUNTY, NEW MEXICO
ON APRIL 26, 1995

DECISION AND ORDER

This matter came before the Court for hearing on November 16, 1994. The Wilson Corporation, Berridge Distributing Company, Metzger Stores, Inc., Polk Oil Company, Colomex Oil & Gas Company, Ross Oil Company and Robinson Oil Company (collectively "Distributors"), Petitioners, Cross-Respondents and Intervenors herein, were represented by F. Edwin Hallman, Jr., David C. Moss, Robin C. Blair and Randolph B. Felker. The State of New Mexico, *ex rel.* Tom Udall, Attorney General, Petitioner, Respondent and Cross-Petitioner herein, was represented by Susan G. White and Eugene I. Zamora, Assistant Attorney Generals.

The State was required to show that the Civil Investigative Demands ("CID") were proper in form, that the State has reasonable grounds to believe that the Distributors have information or may be in possession, custody or control of any document or other tangible

object relevant to a civil investigation for violation of the Antitrust Act and that the CIDs otherwise complied with the requirements of § 57-1-5 of the New Mexico Antitrust Act, NMSA 1978, (1987 Repl.)(The "Act").

The Distributors were permitted to defend and to present evidence and testimony to support their claims that the CIDs were burdensome and oppressive, were not in proper form, were unconstitutional and were issued by the Attorney General with improper motives. The Distributors subpoenaed the Attorney General's Communications Director, Kay Roybal, and one of the Attorney General's consultants, Sam Rodar, to testify at the hearing. Both Ms. Roybal and Mr. Rodar appeared, were examined and by agreement of counsel for Distributors thereafter excused. The Distributors also subpoenaed Attorney General Tom Udall, who did not appear. Following testimony by Ms. Roybal and Mr. Rodar, counsel for the Distributors indicated that the Distributors no longer needed Mr. Udall's testimony and withdrew Mr. Udall's subpoena.

Upon the State's unopposed motion, the following cases, each of which involves virtually identical issues of fact and law, were consolidated under Civil Action File No. 94-66(SQ) for all purposes by Order of December 30, 1994: *State of New Mexico v. Dial Oil Co.*, San Juan County Civil Action No. 94-593(SQ); *State of New Mexico v. Farmington Oil Company,* San Juan County, Civil Action No. 94-597 (SQ); *State of New Mexico v. Graves Oil & Butane Co.*, San Juan County, Civil Action No. 94-598 (SQ); *State of New Mexico v. Eagle Energy,*

Inc., McKinley County, Civil Action No. 94-1 (SQ); *State of New Mexico v. Indian Capitol Distributing Co.*, McKinley County, Civil Action No. 94-2 (SQ); *In re Request for Approval of Civil Investigative Demand*, Santa Fe County, Civil Action No. SF 94-147 (SQ); *Latasa Oil Company, Inc.* v. *State of New Mexico*, Socorro County, Civil Action No. CV 94-84.

Based on the foregoing, the Court finds as follows:

FINDINGS OF FACT

1. On May 31, 1994, the Attorney General applied to the First Judicial District Court, Santa Fe County pursuant to Sections 57-1-5(A) of the New Mexico Antitrust Act for Civil Investigative Demands ("CIDs") to the Wilson Corporation, Colomex Oil & Gas Company, Robinson Oil Company, Metzger Stores, Inc., Eagle Energy, Inc., Farmington Oil Company, Graves Oil & Butane Company, Latasa Oil Company, and Indian Capitol Distributing Company.

2. The First Judicial District Court approved and issued the CIDs on May 31, 1994.

3. On June 6, 1994, the Attorney General applied to the First Judicial District Court, Santa Fe County for CIDs to Berridge Distributing Company, Polk Oil Company, Dial Oil Company, Honstein Oil Company and Ross Oil Company.

4. The First Judicial District Court approved and issued these CIDs on June 7, 1994.

5. The Wilson Corporation acknowledged service of the CID by registered mail; the CID was personally served upon each of the other Distributors by sheriff.

6. The CIDs described the nature of the conduct under investigation by the State as sharp disparities in the price of gasoline from community to community and uniform price increases in certain communities, which together with other information suggests that competition may be limited to one or more levels of the gasoline industry.

7. The written interrogatories were part of the CID.

8. A copy of Section 57-1-5 of the Act was appended to the CIDs.

9. Each CID requires that it be answered within 30 days.

10. The Attorney General's office indicated in correspondence to Distributors and Distributors' counsel that if necessary the return date set in the CIDs would be extended and offered to accommodate if possible any specific problems each Distributor might have in responding to the CIDs as issued.

11. The Distributors claimed generally that the CIDs are burdensome and oppressive.

12. While it will undoubtedly take a considerable amount of time to compile the information sought by the State, the Distributors presented no evidence as to the form in which the information is currently held, whether computerized or not, the process by which it would have to be complied, the realistic number of hours compilation could be made easier, or other specific evidence supporting their claim of burdensomeness.

13. The Distributors argued that the Attorney General should pay, in advance, the cost of compliance with the CIDs.

14. The Distributors claim that the Attorney General sought the CIDs for improper purposes. They argue that the CIDs were sought in aid of the Attorney General's campaign for re-election; that they were sought with the purpose of advising the New Mexico State Legislature; and that the Office of Attorney General is being used by Sam Rodar to pursue his own personal agenda.

15. It is a fact of our electoral system that the Attorney General must run for office every four years.

16. The evidence shows that the Attorney General is investigating gasoline marketing to determine if there are any violations of the Antitrust Act.

17. The Attorney General, although a part of the Executive Branch of government, often serves as advisor to the Legislature, or to individual legislators, upon request.

18. Mr. Rodar testified to the limited role he has played in working for the Attorney General, and the circumscribed scope of work is his contract with the Attorney General verified his limited role in the investigation.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter of these consolidated proceedings.

2. The CIDs state that the Attorney General believes that some gasoline marketers in New Mexico may be violating § 57-1-1 *et seq.* of the New Mexico Antitrust Act and § 57-14-3 of the New Mexico Price Discrimination Act. Price discrimination may violate the Antitrust Act. Therefore even if this reference to the Price Discrimination Act is improvident since the Price Discrimination Act contains no CID provisions, it does not affect the validity of the CID.

3. The CIDs were served on each of the Distributors in conformance with Rule 1-004 of the New Mexico Rules of Civil Procedure, as required by Section 57-1-5(A) of the New Mexico Antitrust Act.

4. The State need not describe with specificity the precise nature of the conduct under investigation, but a description of the general nature of the conduct is sufficient. To insist upon specificity at an early stage of investigation would defeat the purpose of the demand. *See Petition for Gold Bond Stamp Co.*, 221 F. Supp.391 (D.Minn. 1963), *aff'd*, 325 F.2d 1018 (8th Cir. 1964); *Benson v. People*, 703 P.2d. 1274 (Colo. 1985).

5. The description of the nature of the conduct under investigation contained in the CIDs, while general, satisfies the requirements of Section 57-1-5(A) of the Act.

6. The CIDs otherwise comply with the requirements of § 57-1-5(A) of the Act:

(a) The CIDs describe the class or classes of documents or objects sought with sufficient definiteness to permit them to be fairly identified.

(b) The 30-day return date set in the CIDs was reasonable, particularly in light of the fact that the State made clear that it was flexible with respect to the return date and was willing to accommodate particular problems in responding.

(c) A copy of Section 57-1-5 of the Act was appended to the CIDs.

7. No demand to produce a document or object for inspection and copying shall contain any requirements which would be unreasonable or improper if contained in

a subpoena duces tecum issued in a civil proceeding by a district court of this state.

8. The burden of demonstrating that a CID is unreasonably burdensome or otherwise improper as measured against the standards applicable to a subpoena duces tecum is upon the person contesting the CID.

9. Based upon the CIDs themselves and the presentations of the parties, I find that these CID are not unreasonably burdensome and/or oppressive.

10. The paragraph in Section 57-1-5(A) of the Act which prohibits any request for documents from containing demands which would be unreasonable or improper if contained in a subpoena duces tecum issued in a civil proceeding by a district court of this state provides a guideline as to the permissible scope of the CID. That paragraph does not incorporate within the Act the totality of SCRA 1-045, including the payment of costs by the State.

11. The Distributors' request for costs is denied.

12. Tom Udall's investigation of gasoline marketing and other possible violations of the Antitrust Act may endear him to the general public. But the public's endorsement of his efforts, through re-election, do not without substantially more indicate an improper motive.

13. It is entirely proper for the Attorney General to advise the Legislature or individual legislators. It

would be a great and unwarranted waste of state resources if after a thorough investigation the Attorney General were not in a position to share non-confidential information with the Legislature.

14. Distributors have not shown that the CIDs were obtained for the purpose of pursuing legislation aimed at curbing gas prices.

15. The Distributors introduced no credible evidence in support of their claim that Mr. Rodar has persuaded the Attorney General to use his office to advance Mr. Rodar's personal agenda or that Mr. Rodar has in some manner orchestrated the Attorney General's investigation.

16. I find that the Distributors have not made a preliminary and substantial demonstration of abuse and improper motive, and therefore discovery to aid in these defenses to compliance with the CIDs will not be allowed.

17. The evidentiary privilege against self incrimination does not apply to, or extend to, corporations or individuals in their representative capacity. *Doe v. State*, 114 N.M. 78 (1992). There is no constitutional support for Distributors' argument that they should not be required to comply with the CIDs on the grounds that the responses thereto may tend to incriminate the corporations.

18. The Distributors' argument that the CID process in this case was constitutionally deficient because the State did not show probable cause that a violation of

the Antitrust Act has occurred is not persuasive. The cases are legion which hold that the Fourth Amendment right to be free from unreasonable searches and seizures is not implicated in the civil investigative demand process. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Petition of Gold Bond Stamp Co.*, 221 F. Supp. 391, *aff'd*, 325 F.2d 1018 (8th Cir. 1964); *Benson v. People*, 703 P.2d 1274 (Colo. 1985).

19. The process for obtaining and enforcing a CID prescribed by Section 57-1-5 of the New Mexico Antitrust Act includes judicial review of the Attorney General's application for the CID.

20. In determining whether a CID satisfies constitutional requirements, the court must determine (a) that the investigation is for a lawfully authorized purpose; (b) that the information sought is relevant to the inquiry; and (c) that the CID is sufficiently specific to obtain documents which are adequate but not excessive for the industry. A CID is reasonable without probable cause if it satisfies those criteria.

21. Although Art. II, Sec. 10 of the New Mexico Constitution may provide broader protection than does the Federal Constitution in some respects, Section 57-1-5 of the New Mexico Antitrust Act and the process followed by the Attorney General in obtaining CIDs in this case conforms with the requirements of the New Mexico Constitution.

22. The Attorney General is required by Section 57-1-5(C) of the Antitrust Act to keep confidential any material produced pursuant to the Act, prior to filing an action for violations under investigation.

23. To the extent the Distributors believe they need additional protection for information provided in response to the CIDs they may pursue a motion for a protective order. However, such motions and any required motions hearings should not delay compliance with the CIDs in the interim.

24. In summation, I find that the CIDs are proper in form and that there is reasonable cause to believe that each of the Distributors has information or may be in possession, custody or control of documents or other tangible objects relevant to a civil investigation for violations of the Antitrust Act.

THEREFORE, THE COURT ORDERS as follows:

1. The State's Motions for Protective Order with respect to the Distributors' Interrogatories and Requests for Production of Documents are granted;

2. The State's Motion to Quash Subpoena Duces Tecum with respect to Sam Rodar is granted;

3. The Distributors' Motions for Summary Judgment or in the Alternative to Quash Civil Investigative Demands are denied;

4. The State's Petitions for Order requiring each of the Distributors to comply with Civil Investigative Demands are granted;

5. The Wilson Corporation, Berridge Distributing Company, Metzger Stores, Inc., Polk Oil Company, Ross Oil Company, Robinson Oil Company, Colomex Oil & Gas Company, Eagle Energy, Inc., Dial Oil Company, Farmington Oil Company, Graves Oil & Butane Company, Indian Capitol Distributing Company, Honstein Oil Company, and Latasa Oil Company shall each of them comply fully and under oath within 30 days of entry of this Order with the Civil Investigative Demands issued variously by the First Judicial District Court, Santa Fe County, on May 31, 1994 and June 7, 1994; and

6. The Court will retain jurisdiction of these cases for the propose of resolving any disputes that may arise in the course of compliance with these CIDs.

ORDERED this 26th day of April, 1995.

/s/ Peggy L. Nelson
District Judge

Approved As to Form:

/s/_____

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/s/_____

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Attorney for the State of New Mexico

ORDER ON REHEARING

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
June 5, 1996

NO. 23,583

THE WILSON CORPORATION, et al.,

Petitioners-Petitioners,

vs.

STATE OF NEW MEXICO, ex rel.,
TOM UDALL, ATTORNEY GENERAL,

Respondent-Respondent,.

TOM UDALL, Attorney General
of the State of New Mexico,

Petitioner-Respondent,

vs.

THE WILSON CORPORATION, et al.,

Respondents-Petitioners,

and

BERRIDGE DISTRIBUTING CO., INC.,

Intervenors-Petitioners.

ORDER

This matter coming on for consideration by the Court upon petitioner's motion for rehearing of the order denying the petition for writ of certiorari, and the Court having considered said motion, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the motion hereby is DENIED.

ATTEST: A TRUE COPY

/s/ Kathleen Jo Gibson

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES

[AMENDMENT IV]

[Security from Unwarrantable Search and Seizure]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTES

NEW MEXICO ANTITRUST ACT
NMSA 1978 § 57-1-1, *et seq.*

CHAPTER 57

Trade Practices and Regulations

57-1-1. Contracts, agreements, combinations or conspiracies in restraint of trade.

Every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within the state, is unlawful.

57-1-1.1. Short title.

Sections 57-1-1 through 57-1-15 NMSA 1978 may be cited as the "Antitrust Act."

57-1-1.2. Definition.

As used in the Antitrust Act [57-1-1 to 57-1-15 NMSA 1978], "person" means an individual, corporation, business trust, partnership, association or any governmental or other legal entity with the exception of the state, except as used in Subsection B of Section 57-1-3 NMSA 1978, and the United States.

57-1-2. Monopolies.

It is hereby declared to be unlawful for any person to monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, trade or commerce, any part of which trade or commerce is within this state.

57-1-3. Contracts for restraint of trade or monopoly void; civil liability of participants; injunctive relief; purchasers relieved from payment.

A. All contracts and agreements in violation of Section 57-1-1 or 57-1-2 NMSA 1978 shall be void, and any person threatened with injury or injured in his business or property, directly or indirectly, by violation of Section 57-1-1 or 57-1-2 NMSA 1978 may bring an action for appropriate injunctive relief, up to threefold the damages sustained and costs and reasonable attorneys' fees. If the trier of fact finds that the facts so justify, damages may be awarded in an amount less than that requested, but not less than the damages actually sustained.

B. The attorney general may bring an action under Subsection A of this section on behalf of the state, a political subdivision thereof or any public agency.

C. In any action under this section, any defendant, as a partial or complete defense against a damage claim, may, in order to avoid duplicative liability, be entitled to prove that the plaintiff purchaser or seller in the chain of manufacture, production, or distribution who paid any overcharge or received any underpayment, passed

on all or any part of such overcharge or underpayment to another purchaser or seller in such chain.

D. For the purposes of this section, "business or property" includes business or nonbusiness purchases and business and nonbusiness injuries.

57-1-4. Organizations exempted.

The labor of a human being is not a commodity or article of commerce. No law against monopolies or combinations in restraint of trade shall be held or construed to forbid the existence and operation of natural gas marketing, labor, agricultural or horticultural organizations instituted for purposes of mutual help and not having capital stock or conducted for profit to the organization or to forbid or restrain individual members of such organizations from lawfully carrying out the objects thereof; nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under any law against monopolies or combinations in restraint of trade. No natural gas marketing organization exempted herein shall be organized in such a manner so as to control more than ten percent of the natural gas market. Nothing in this section shall be held or construed to justify any restraint of trade or restriction of competition except such as is incident to the protection and promotion of the interests of the members of such organizations, in view of their situation and circumstances, but such organizations and their objects and the effectuation thereof shall prima facie be presumed to be in reasonable restraint of trade or restriction of competition.

57-1-5. Attorney general; investigation.

A. If the attorney general has reasonable cause to believe that a person has information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of Section 57-1-1 or 57-1-2 NMSA 1978, he may, before bringing any action, apply to the district court of Sante Fe county for approval of a civil investigative demand, demanding, in writing, such person to appear and be examined under oath, to answer written interrogatories under oath, or to produce the document or object for inspection and copying. The demand shall:

(1) be served upon the person in the manner required for service of process in this state, or, if the person cannot be found or does not reside or maintain a principal place of business within this state, in the manner required for service of process in the state in which the person resides, maintains a principal place of business or can be found;

(2) describe the nature of the conduct under investigation;

(3) describe the class or classes of documents or objects with sufficient definiteness to permit them to be fairly identified, if the production of documents or objects is requested;

(4) contain a copy of the written interrogatories, if answers to written interrogatories are sought;

(5) prescribe a reasonable time at which the person must appear to testify, within which to answer the written interrogatories or within which the document or object must be produced;

(6) specify a place for the taking of testimony or for production and designate a person who may be an authorized employee of the attorney general, to be custodian of the document or object; and

(7) contain a copy of Subsections B, D, and D of this section.

No demand to produce a document or object for inspection and copying shall contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued in a civil proceeding by a district court of this case.

The district court shall approve the demand if it finds that the attorney general has reasonable cause to believe that a person has information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of Section 57-1-1 or 57-1-2 NMSA 1978 and that the demand is proper in form. A demand shall not be issued without approval of the district court.

B. If a person fails to comply with the written demand served upon him under the provisions of Subsection A of this section, the attorney general may file in the district court of the county in which the person resides or in which he maintains a principal place of business within this state or of the county of Sante Fe if the person neither resides nor has a principal place of business in this state a petition for an order to enforce the demand. Notice of hearing the petition and a copy of the petition shall be served upon the person, who may appear in opposition to the petition. If the court finds that the demand is proper in form and there is reasonable cause to believe that the person has information or may be in possession, custody or control of any document or other

tangible object relevant to a civil investigation for violation of Section 57-1-1 or 57-1-2 NMSA 1978, the court shall order the person to comply with the demand, subject to any modification that the court may prescribe. Upon motion by the person and for good cause shown, the court may make any further protective order in the proceedings that justice requires.

C. Prior to the filing of an action under the provisions of the Antitrust Act for the violation under investigation, any testimony taken or material produced under this section shall be kept confidential by the attorney general unless confidentiality is waived by the person being investigated and the person who has testified, answered interrogatories or produced material, or disclosure is authorized by the court. All court records, including docket, application, petitions, motions and other papers filed under this section shall be open to inspection only to the attorney general and the person upon whom the demand for which inspection is sought has been served, unless otherwise ordered by the court.

D. Any person compelled to appear under this section and required to testify under oath may be accompanied, represented and advised by counsel. An objection may properly be made, received and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege.

57-1-6. Criminal penalty.

A. Any person who violates Section 57-1-1 or 57-1-2 NMSA 1978 shall be guilty of a fourth-degree felony and, for conviction thereof, if a person other than

an individual, it shall be punished by a fine not to exceed two hundred fifty thousand dollars ($250,000), or, if an individual, imprisonment in the penitentiary for a determinate term of not less than one year nor more than five years, or by the payment of a fine not to exceed fifty thousand dollars ($50,000), or both such imprisonment and fine in the discretion of the court. An indictment must be found or information or complaint must be filed within three years from the time of the violation.

B. No criminal action may be brought against any person for the same violation for which such person has been convicted in a criminal proceeding for violation of the federal antitrust laws.

C. For the purposes of this section, "individual" means a person other than a corporation, business trust, partnership, association or other governmental or legal entity.

57-1-7. Civil penalty.

A. The attorney general may bring an action for civil penalties in the name of the state against any person for violation of Section 57-1-1 or 57-1-2 NMSA 1978. Any individual who violates Section 57-1-1 or 57-1-2 NMSA 1978 shall be subject to a civil penalty of not more than fifty thousand ($50,000), or, if a person other than an individual, not to exceed two hundred fifty thousand dollars ($250,000).

B. Any person who fails to comply with a final judgement or decree of a court of this state issued for a violation of the Antitrust Act shall be subject to a civil penalty; if an individual, the penalty shall be not more than fifty thousand dollars ($50,000), or, if a person other

than an individual, the penalty shall be not more than two hundred fifty thousand dollars ($250,000).

C. No action for a civil penalty may be brought against any person for the same violation for which such person has been convicted in a criminal proceeding for violation of the federal antitrust laws.

D. For the purposes of Subsections A and B of this section, "individual" means a person other than a corporation, business trust, partnership, association or other governmental or legal entity.

57-1-8. Attorney general; injunctive relief.

The attorney general may bring an action in the name of the state against any person to enjoin, restrain and prevent the doing in this state of any act declared unlawful under Section 57-1-1 or 57-1-2 NMSA 1978.

57-1-9. Election of remedies.

The obtaining of a judgement under the Antitrust Act to assess a civil penalty against a person shall be an election of remedies to not bring a criminal prosecution against such person under the Antitrust Act. The institution of a criminal prosecution under that act against a person by filing an information or complaint or returning an indictment shall be an election of remedies not to bring suit to assess a civil penalty against such person under that act.

57-1-10. District attorneys; enforcement.

In order to promote the uniform administration of the Antitrust Act in New Mexico, the attorney general is to be responsible for its enforcement, but he may, on a case-by-case basis, delegate this authority to the district attorneys of the state and when this is done, the district attorneys shall have every power and duty conferred upon the attorney general by this act. [57-1-1 to 57-1-3, 57-1-5 to 57-1-19 NMSA 1978].

57-1-11. Judgment in favor of state as prima facie evidence.

A. A final judgment or decree in a civil or criminal proceeding determining that a person has violated Section 57-1-1 or 57-1-2 NMSA 1978 in an action brought by the state is prima facie evidence against such person in any other action against him under the provisions of Section 57-1-3 NMSA 1978 as to all matters with respect to which the judgment or decree would be an estoppel between the parties thereto. This section does not affect the application of collateral estoppel or issue preclusion.

B. For the purposes of Subsection A of this section, "final judgment" or "decree" shall not include a consent judgment or decree entered before any testimony has been taken at trial in a civil proceeding or a judgment based upon a plea of nolo contendere in a criminal proceeding.

57-1-12. Limitations of actions.

A. An action brought under the provisions of Section 57-1-7 or 57-1-8 NMSA 1978 is barred if it is not commenced within four years after the cause of action accrues or within four years after the plaintiff discovered, or by the exercise of reasonable diligence should have discovered, the facts relied upon for proof of the cause of action, whichever is later.

B. An action brought under the provisions of Section 57-1-3 NMSA 1978 to recover damages is barred if it is not commenced within four years after the cause of action accrues or within four years after the plaintiff discovered, or by the exercise of reasonable diligence should have discovered, the facts relied upon for proof of the cause of action, whichever is later. Provided, however, that a cause of action is not barred if it is commenced within one year after the conclusion of a timely action brought by the state under the provisions of Section 57-1-6, 57-1-7 or 57-1-8 NMSA 1978, based in whole or in part on any matter complained of in the action for damages, whichever is later.

C. For the purposes of this section, a cause of action for a continuing violation is deemed to accrue at any time during the period of the violation.

57-1-13. Actions involving interstate or foreign commerce.

No action under the Antitrust Act shall be barred on the ground that the activity or conduct complained of in any manner affects or involves interstate or foreign commerce.

57-1-14. Remedies cumulative.

Subject to Section 57-1-9 NMSA 1978, the remedies afforded the state under the Antitrust Act shall be cumulative.

57-1-15. Construction.

Unless otherwise provided in the Antitrust Act, the Antitrust Act shall be construed in harmony with judicial interpretations of the federal antitrust laws. This construction shall be made to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices.

57-1-16. [Lawful activities.]

Nothing contained in the Antitrust Act is intended to prohibit actions which are:

A. clearly and expressly authorized by any state agency or regulatory body acting under a clearly articulated and affirmatively expressed state policy to displace competition with regulation; and

B. actively supervised by the state agency or regulatory body which is constitutionally or statutorily granted the authority to supervise such actions when the agency or regulatory body does not have any propriety interest in the actions.

57-1-17. Limitation on recovery of damages.

A. Notwithstanding the provisions of Section 57-1-3 NMSA 1978:

(1) no damages or interest on damages may be recovered under the Antitrust Act from any local government or official or employee thereof acting in an official capacity; provided, however, that in an action for a permanent injunction brought against a local government or official or employee thereof acting in an official capacity, costs and reasonable attorneys' fees may be granted to the prevailing party; and

(2) no damages or interest on damages may be recovered under the Antitrust Act in any claim against a person based on any official action directed by a local government or official or employee thereof acting in an official capacity; provided, however, that in an action for permanent injunction brought against a person based on any official action directed by a local government or official or employee thereof acting in an official capacity, costs and reasonable attorneys' fees may be granted to the prevailing party.

B. As used in this section:

(1) "local government" means:

(a) a city, county or any other general function governmental unit established by state law; or

(b) a school district, sanitary district or any other special function governmental unit established by state law; and

(2) "person" has the meaning given it in Section 57-1-1.2 NMSA 1978 but does not include any local government as defined in Paragraph (1) of this subsection.

57-1-18. Limitation of purchases unlawful.

It is unlawful for any merchant to advertise or offer for sale any item of merchandise with a limitation upon the number of such items which any purchaser may purchase at the advertised price. It is further unlawful for any merchant offering or advertising any such item of merchandise in his place of business at any given price to refuse to sell to any prospective purchaser for cash the whole or any part of his stock of such items at such price.

57-1-19. [Violation of act; penalty.]

Any person convicted of violating this act [57-1-18, 57-1-19 NMSA 1978] shall be punished by a fine of not more than five hundred dollars ($500) or by imprisonment of not more than ninety days, or by both such fine and imprisonment.